

## STIPULATIONS

The Appeals Board adopts the stipulations set forth in the Award of the Administrative Law Judge.

### **ISSUES**

The sole issue before the Appeals Board is the extent of liability of the Kansas Workers' Compensation Fund. All other issues have been resolved.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record, the Appeals Board, finds, as follows:

(1) For the reasons expressed below, the finding of the Administrative Law Judge that the Fund has no liability in this proceeding is affirmed.

Claimant was hired by the respondent as a drywaller without an extensive interview when claimant reported to the job site. When the owner of respondent company advised claimant he would leave his stilts, claimant commented that he did not want to wear them as it caused him pain in his foot. Respondent testified that some drywallers prefer stilts, some don't; some drywallers never use stilts, and some do not know how. Respondent was not concerned about claimant's foot problem because scaffolding was available. Although using stilts provides a drywaller added flexibility and speed, respondent testified that wearing stilts was not a requirement of the job for his drywallers.

Claimant testified about his foot problem prior to beginning work with the respondent. Claimant stated that he had numbness in his foot for approximately twelve years and that his foot would experience numbness anytime he would wear stilts. Claimant attributed the numbness to the straps that held the stilts in place. Claimant also testified that he did not feel that he was impaired prior to the subject injury as the numbness in his foot would resolve when he removed the straps.

Before liability can be assessed against the Workers Compensation Fund, the respondent must prove that it knowingly employed or retained a handicapped employee as that term is defined in K.S.A. 44-566. K.S.A. 44-566 defines handicapped employee as "one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed...".

Under the evidence presented the Appeals Board finds that the respondent has failed to meet its burden. When considering the evidence as a whole, it is apparent that claimant did not consider himself impaired by reason of his foot condition before beginning work with the respondent. Claimant felt that the numbness in his foot was due to pressure applied to the foot by the strap from the stilt. Claimant testified that once he removed the strap then his foot was fine. Claimant did not indicate that he felt his foot condition limited him or restricted him in any manner.

The Appeals Board also finds that the brief conversation that the owner of the respondent company had with claimant prior to claimant's beginning work is insufficient to establish that the respondent had knowledge of a pre-existing impairment that would constitute a handicap in claimant's obtaining or retaining employment. Claimant mentioned

that wearing the stilts might cause him some pain, but did not otherwise quantify the extent of discomfort or provide information from which the condition could be found disabling.

Knowledge of a prior injury does not constitute knowledge of a prior handicap. Johnson v. Kansas Neurological Institute, 240 Kan. 123, 722 P.2d 912 (1986); and Carter v. Kansas Gas and Electric Company, 5 Kan. App.2d, 602, 621 P.2d 448 (1980). Knowledge of discomfort and minor symptomatology does not constitute knowledge of a handicap. Based upon the record as a whole, the Appeals Board finds that the respondent has failed to prove that claimant was hired or retained with knowledge that claimant had a physical impairment that constituted a handicap.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Fund should, and hereby is, absolved of liability in this proceeding; that the Award of Administrative Law Judge Shannon S. Krysl dated August 2, 1994 is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October ,1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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